

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 18 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996

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CC Docket No. 96-98 /

**BELLSOUTH'S COMMENTS IN OPPOSITION TO
ITC DELTACOM'S PETITION FOR WAIVER**

BellSouth Corporation, on behalf of itself and its wholly owned affiliates ("BellSouth"), files these comments in opposition to ITC DeltaCom's ("DeltaCom") waiver petition.

I. Introduction

DeltaCom seeks a waiver of the Commission's rules established in the *Supplemental Order*¹ and the *Supplemental Order Clarification*.² In those Orders the Commission established rules related to the conversion of tariffed special access services to unbundled network elements ("UNEs"). The Commission correctly recognized the negative policy impacts of allowing carriers to merely convert special access services that are used primarily for access purposes to UNEs. The Commission therefore limited the ability to convert tariffed special access services to UNEs to situations where the carriers used the loops and transport facilities to provide a

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order*, 15 FCC Rcd 1761 (1999) ("Supplemental Order").

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("Supplemental Order Clarification").

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“significant amount of local exchange service.” The Commission specifically defined what constitutes a “significant amount of local exchange service,” thus providing carriers a set of safe-harbor rules to know when conversion was allowable. The Commission established these safe-harbor rules to allow the industry to operate while the Commission considered the larger policy issues associated with tariffed special access services. To that end, the Commission released a *Public Notice*³ to obtain public comments on the matter. That proceeding is on-going and includes the very issue that is the subject of the DeltaCom waiver. Moreover, the circumstances surrounding this issue for DeltaCom are the same as when the Commission issued the *Supplemental Order Clarification* and the *Public Notice*. Accordingly, because of this on-going proceeding and the fact that no special circumstances exist that would warrant a waiver from the safe-harbor rules, the Commission should deny DeltaCom’s Petition.

II. DeltaCom Fails to Satisfy the Waiver Standard

The Commission has authority to grant a waiver of its rules only when there is a showing of “good cause.” “That discretion, however, ‘does not contemplate that [the Commission] must or should tolerate evisceration of a rule by waivers.’ Rather, petitioners generally face a ‘high hurdle’ to show that a waiver is justified.”⁴ DeltaCom cannot clear such a hurdle. Indeed, in order to grant DeltaCom’s waiver, DeltaCom must demonstrate particular facts that make strict

³ *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, *Public Notice*, 16 FCC Rcd 2261 (2001) (“*Public Notice*”).

⁴ *In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Expedited Declaratory Ruling on Interstate IntraLATA Toll Dialing Parity or, in the Alternative, Various Other Relief*, CC Docket No. 96-98, NSD-L 98-121, *Order*, 14 FCC Rcd 6806, 6811 at ¶ 11 (1999).

compliance with the rule inconsistent with the public interest. In addressing this issue the D.C.

Circuit stated:

a waiver is appropriate *only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.* The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.⁵

DeltaCom has offered no special circumstances that warrant a deviation from the safe-harbor rules established by the Commission in the *Supplemental Order Clarification*. DeltaCom is asking the Commission to waive its rule against co-mingling tariffed special access services with UNEs. DeltaCom desires to convert DS-1 circuits that extend from the customer's premises to the incumbent local exchange carrier's ("ILEC") wire center from special access to UNEs. The DS-1s are then multiplexed onto a DS-3 circuit that extends from the ILEC's wire center to DeltaCom's point of presence ("POP"). Because the DS-3 circuit would not maintain the requisite amount of local traffic, DeltaCom desires to purchase it as a tariffed special access circuit, thus co-mingling UNEs and tariffed services. The issue of co-mingling is not unique and clearly does not constitute special circumstances that the Commission did not consider when it issued the *Supplemental Order Clarification*.⁶ Therefore, DeltaCom fails to meet the requirements for obtaining a waiver.⁷

⁵ *Northeast Cellular Telephone Co. v FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*emphasis added*).

⁶ *See Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28. (The Commission specifically rejected WorldCom's request to eliminate the prohibition on co-mingling.); *Public Notice* at 3 (the Public Notice asked for Comments "on whether requesting carriers should be permitted to combine UNEs with tariffed access services that they purchase from the ILECs.")

⁷ *See Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) ("heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are

DeltaCom's reasoning for seeking the waiver to allow it to co-mingle tariffed special access services and UNEs does not represent special circumstances. Simply put, DeltaCom's argument is a matter of cost. That is, DeltaCom's cost for tariffed special access exceeds the cost of UNEs. Therefore, DeltaCom would prefer to receive the DS-1 facilities at the lower UNE prices. This argument is hardly novel. The Commission has recognized that UNE prices are below tariffed special access rates. The Commission, however, also recognized that very complicated policy issues associated with the unbundling requirements for special access services, including whether the impairment standard⁸ is met for transport services and concerns about universal service, warranted limitations on the conversion of special access to UNEs until such policy issues could be fully resolved. The fact that DeltaCom's costs would be lowered, a fact the Commission was well aware of when it established the safe-harbor rules, is no reason to vacate those rules as they relate to DeltaCom.

Moreover, DeltaCom's assertions supporting its request are flawed. First, DeltaCom alleges that it will have "stranded" investment if it cannot co-mingle the DS-1 circuits as UNEs with a DS-3 tariffed special access circuit. DeltaCom alleges that if it is not allowed to co-mingle tariffed services and UNEs, then it will be forced to purchase a separate entrance facility (the facility from the ILEC's wire center to DeltaCom's POP) on which to group local exchange traffic and continue the tariffed special access service for exchange access. DeltaCom alleges that if it does this but then loses a customer for the local exchange service, its investment in the additional facility will be "stranded." These allegations, however, offer a contrived explanation

substantially different from those which have been carefully considered at the rulemaking proceeding").

⁸ See 47 U.S.C. § 251(d)(2)(B).

of the network. While a second entrance facility may be necessary to comply with the safe-harbor rules established in the *Supplemental Order Clarification*, if DeltaCom orders such a facility from BellSouth, which it would as a UNE, and that facility is no longer needed, the investment is not stranded for DeltaCom. DeltaCom would be leasing the facility from BellSouth on a month-to-month basis. DeltaCom could merely cancel the circuit. There would be no stranded investment to DeltaCom.⁹ Indeed, to the extent any carrier would have stranded investment it would be BellSouth.

Second, DeltaCom ignores the other options established by the Commission as safe-harbor rules in the *Supplemental Order Clarification*. DeltaCom could simply utilize existing collocation space or acquire collocation space within one wire center in each BellSouth local access and transport area (“LATA”). Within the collocation space DeltaCom could place its multiplexer. DeltaCom could then terminate DS-1 UNEs into its collocation space and multiplex them onto a DS-3 UNE entrance facility to its POP. Under this arrangement, all of the facilities can be purchased as UNEs.

The forgoing paragraphs clearly demonstrate that DeltaCom has not identified special circumstances that warrant the Commission to allow a deviation of the safe-harbor rules. The circumstances discussed by DeltaCom are no different from the circumstances that existed when the Commission issued the *Supplemental Order Clarification*. Moreover, deviation from the safe-harbor rule will not benefit the public interest. Indeed, the reason the Commission implemented the rules was to ensure that the public interest, in the form of universal service,

⁹ DeltaCom may incur upfront non-recurring cost to establish the circuit. The loss of such cost cannot be properly termed stranded investment. These costs, as well as other costs associated with the local exchange circuit including any potential stranded BellSouth facilities, could be minimized by DeltaCom obtaining DS-1 UNE entrance facilities to its POP, as opposed to a DS-3, for its local traffic.

would not be compromised. The Commission's concern generated the issuance of the *Public Notice*, which specifically addresses special access conversion issues including whether co-mingling of UNE and tariffed services should be allowed. That proceeding is still before the Commission, with comments having been filed by numerous parties.¹⁰ The Commission should therefore reserve any decision regarding this issue for the Commission proceeding and not by an incomplete record in piece-meal waiver requests.¹¹

III. Conclusion

The Commission should reject DeltaCom's waiver request. It offers no special circumstances beyond those considered when the Commission issued its orders on this matter. Accordingly, a waiver is not justified. Furthermore, the issue is presently before the

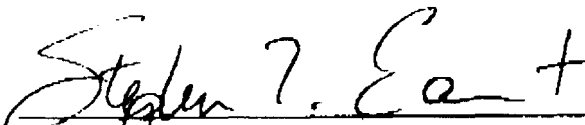
¹⁰ The Competitive Telecommunications Association ("CompTel") filed comments on behalf of itself and its members, of which DeltaCom is a member, on April 5, 2001. In those comments CompTel argues that the Commission should allow co-mingling of UNEs and tariffed services. See CompTel comments at 32 -34. DeltaCom filed reply comments on April 30, 2001 supporting CompTel's comments and specifically stated that "[t]he Commission should ...lift the restrictions on co-mingling." Accordingly, DeltaCom has had opportunity to be heard on this issue in the Commission proceeding implemented to decide issues regarding access services, including co-mingling.

¹¹ Other carriers have requested waivers from the Commission on this same issue. See *WorldCom Petition for A Waiver*, filed in CC Docket No. 96-98, on September 12, 2000. BellSouth is unsure how the Commission could articulate a standard that would allow a deviation from the general rule for one carrier and not another. Accordingly, granting of one petition would lead to "an evisceration of the rule by waivers." See *Industrial Broadcasting*, 437 F.2d at 683 (requiring special circumstances substantially different from those considered during rulemaking ensures that "one of the foremost advantages of rulemaking—the formulation and effectuation of agency policy with a minimum expenditure of time and resources—will not be undermined by the necessity for continuous case-by-case adjudication").

Commission in a rulemaking proceeding. Thus, any deviation from the rule for any carrier should be through the Commission's on-going rulemaking.

Respectfully submitted,

BELLSOUTH CORPORATION

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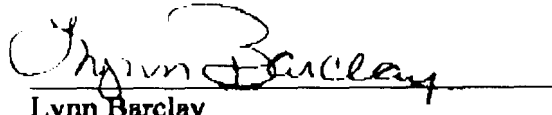
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Date: September 18, 2001

CERTIFICATE OF SERVICE

I do hereby certify that I have this 18th day of September 2001 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S OPPOSITION TO ITC^DELTCOM'S PETITION FOR WAIVER** by hand delivery and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.


Lynn Barclay

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